

## *Insulting accusation of domestic violence*

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Strasbourg Observer Blog 5 January 2021, <https://strasbourgobservers.com/2021/01/05/insulting-accusation-of-domestic-violence/#more-5013>

Inform's Blog 6 January 2021, <https://inform.org/2021/01/06/case-law-strasbourg-tolle-v-croatia-conviction-for-insulting-accusation-of-domestic-violence-breached-article-10-dirk-voorhoof-and-inger-hoedt-rasmussen/>

Global Freedom of Expression Website, Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/tolle-v-croatia/>

The European Court of Human Rights (ECtHR), delivered an interesting judgment in the case of *Tölle v. Croatia* about insulting allegations of domestic violence. In a newspaper article a father accused an association to be responsible for his child's abduction by the mother. The president of this association providing support for women victims of violence replied in a radio-interview that her organisation was not involved in the daughter's abduction and that the man had violently abused his wife. That was also the reason why mother and daughter had fled the country. The association's president was subsequently convicted for the criminal offence of insult. The ECtHR found that this criminal conviction amounted to a violation of the association's president's freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The Court finds the criminal conviction for insult a sort of censorship, discouraging the promotion for support of victims of domestic violence.

### **Facts**

The applicant in this case is Ms Neva Tölle, the president of the Zagreb Autonomous Women's House ('the Association'), an association that supports women victims of violence. The Association had intervened in a family dispute between a certain D.O. and his wife C.O. following a request for help from the latter. C.O. and the couple's minor daughter stayed for several months at the Association's refuge for women, and afterwards C.O. took the child abroad. A daily newspaper published an interview with D.O. in which he alleged that the Association was responsible for the fact that his daughter had been kidnapped by her mother. The same day Ms Tölle explained the circumstances of the Association's actions in the case and denied its involvement in child abduction. She stated that D.O. had been abusing his wife and she added:

*'practice – not only that of [the Association], but also that of all [women's] refuges in the world – has shown that victims speak about only one third of what they have been through, not everything. That means that there was certainly much more to it than what C.O. managed to tell us; women are ashamed to speak about it in detail, so I do not have any doubt that C.O. was a victim of abuse [perpetrated] by her husband D.O.'*

Ms. Tölle also said that the criticism by D.O. on her Association was to present the abuser as the victim and the victim as the abuser. She called this a 'burning issue' and 'absolutely unacceptable in domestic violence cases'.

A few weeks later D.O. brought a private criminal prosecution against Ms Tölle on charges of

defamation relating to her allegations that he had abused his wife. Ms Tölle was found guilty of insult, finding that she had tarnished D.O.'s honour and reputation by alleging that he had abused his wife. The domestic courts were of the opinion that the accusation at issue could not be qualified as defamation, but as insult. By referring to D.O. as an abuser, Ms Tölle had stated a negative opinion of him that was 'objectively insulting'. Ms Tölle was sanctioned with a judicial admonition and ordered to pay the costs and expenses of the proceedings, as well as the expenses incurred to D.O. and to his lawyer. Both an appeal before a second-instance court and before the Constitutional Court were dismissed.

Before the ECtHR, Ms Tölle complained that her criminal conviction had violated her right to freedom of expression guaranteed by Article 10 ECHR. She argued that she had merely exercised her constitutionally-guaranteed right of reply to D.O.'s accusations that the Association was responsible for the abduction of his minor daughter. Ms Tölle submitted that she had reasonable grounds to believe that D.O. had abused his wife, referring to the direct testimony of the victim, the proceedings for domestic violence in D.O.'s family, her experience in working with female victims of domestic abuse for a decade, and the statements of two witnesses. Ms Tölle also argued that the private prosecution had aimed to censor her work and the work of similar associations. She had been sentenced in criminal proceedings for a crime she had not committed, and anxiety regarding a potential claim for damages had to some extent determined her behaviour in the years following the impugned judgment.

### **Judgment**

The domestic courts based Ms Tölle's conviction on the offence of insult as provided for in Article 199(2) of the Criminal Code, and the ECtHR accepts that the interference with the applicant's right in the present case was prescribed by law. Neither was it in dispute that the interference had pursued the legitimate aim of the protection of the rights of others, namely the honour and reputation of D.O. What remained to be established was whether that interference was 'necessary in a democratic society', in conformity with Article 10 § 2 ECHR and the Court's case law.

The ECtHR first notes that the present case concerns a conflict between concurrent rights, namely, on the one hand, D.O.'s right to reputation as part of his private life, and on the other hand Ms Tölle's right to freedom of expression. Referring to [\*Axel Springer AG v. Germany\*](#) and [\*Couderc and Hachette Filipacchi Associés v. France\*](#), the ECtHR evaluates:

1. whether the radio-interview at issue was about a matter of public interest,
2. how well-known D.O. was and the subject and context of the interview,
3. the prior conduct of D.O.,
4. the content, form and consequences of the radio-interview and
5. the severity of the sanction imposed on Ms Tölle.

The ECtHR considers that the central issue discussed in the radio-interview was about violence against women and domestic violence, an issue of important public interest and the subject of a social debate, 'both at the material time and today'. As D.O. had given an interview in a national daily newspaper, he had entered the arena of public debate, and therefore he should have had a higher threshold of tolerance towards any criticism directed at him. Furthermore D.O. had publicly accused the Association managed by Ms Tölle of a serious criminal act in the media. In such circumstances, and bearing in mind that the right of rectification or of reply falls within the scope of Article 10 ECHR, Ms Tölle could not have been expected to remain passive and not to defend the Association's reputation.

The ECtHR finds that in assessing the nature of the impugned statements, the domestic courts limited their analysis to the fact that D.O. had never been convicted of domestic violence. The ECtHR reiterates however, that although a final criminal conviction amounts to incontrovertible proof that a person has committed an offence, it is unreasonable to similarly circumscribe the manner in which allegations about that person's criminal conduct are proved in the context of a defamation or insult case. The ECtHR also holds that the domestic courts did not embark on an analysis of whether Ms Tölle had had reasonable grounds to believe that D.O. had actually abused his wife. The ECtHR refers to the fact that Ms Tölle's association had provided C.O. with shelter for several months and that witnesses had testified that there had been some sort of police interventions and allegations of domestic violence in D.O.'s family. Instead of pertinently evaluating the context of the comments by Ms Tölle, the domestic courts merely classified the impugned statement as a value judgment expressing a negative opinion of D.O. which had been objectively insulting to him.

With regard to the nature of the interference with Ms Tölle's freedom of expression the ECtHR is of the opinion that the penalty imposed on her was mild, but that it nonetheless consisted of a criminal conviction, and consequently an entry on Ms Tölle's criminal record. The ECtHR recognises that the sanction itself did not prevent Ms Tölle from remaining involved in the Association's activity, but the ECtHR finds that the criminal conviction nevertheless amounted to a sort of censorship which might have discouraged her from promoting the Association's statutory aims in the future. The ECtHR also finds that the criminal conviction strengthened D.O.'s chances of obtaining damages against Ms Tölle in civil proceedings.

The ECtHR, sitting as a Committee, concludes that the domestic courts failed to take into account that Ms Tölle had been exercising her right of reply in relation to a serious accusation made against an association of which she was the president. Neither have the domestic courts carried out an adequate proportionality analysis with a view to assessing the overall context in which the impugned expressions had been used and their factual basis. They thus exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting Ms Tölle's right to freedom of expression and the legitimate aim pursued of the protection of the reputation or the rights of others. There has accordingly been a violation of Article 10 ECHR.

### **Comment**

The judgment in *Tölle v. Croatia* considers violence against women and domestic violence an issue of important public interest 'both at the material time and today'. Indeed [international reports](#) indicate that globally an immense number of women have experienced physical and/or sexual intimate partner violence, or sexual violence by a non-partner. Calls to helplines have increased five-fold in some countries because of the [COVID-19 pandemic](#). Restricted movement, social isolation, and economic insecurity are increasing women's vulnerability to violence in the home around the world ([UN Secretary General Report \(2020\)](#) on Intensification of efforts to eliminate all forms of violence against women). The Council of Europe's [website on Gender Equality](#) reports that 'violence against women is the most common violation of women's human rights in Europe', while progress with policy and legal reform to tackle this phenomenon is slow. In such a context a holistic and systemic approach is needed to eliminate all forms of violence against women. This includes the support and encouragements of the work of NGOs involved in combating domestic violence and violence against women (see [Recommendation Rec\(2002\)5](#) of the Committee of Ministers to member states on the protection of women against violence). From this perspective the judgment in *Tölle v. Croatia* contains an

important message to those who are providing women victims of violence with support, a message not to keep silent, to create awareness on the issue and to react on victim blaming, including by (alleged) perpetrators of violence against women.

It is deplorable however that it took so long time before this message was received. During the 17 years the case was pending, there has been, in the terms of the ECtHR itself, a sort of censorship hindering Ms Tölle to speak out freely in support of victims of domestic violence and to play her role as president of an organisation providing women victims of violence with support. The domestic proceedings **lasted nine years and it took another eight years** at the Strasbourg Court before a Committee of three judges delivered the judgment finding a violation of the applicant's right in this case, explicitly referring to the important matter of public interest that was covered by the impugned statements about domestic violence and violence against women. As violence against women is the most common violation of women's human rights in Europe, this judgment is an example of delayed justice and even denied justice for too long time for those in the frontline giving support to victims of domestic violence.

The judgment at the same time confirms the importance and the urgency of guaranteeing a better protection against domestic violence. In several cases of domestic violence against women, the ECtHR has found violations of the ECHR, in particular with regard to Article 2, 3 and 14 and the states' positive obligations in relation to these articles (see e.g. [Volodina v. Russia](#) (blog); [Talpis v. Italy](#) (blog); [Opuz v. Turkey](#) and [Halime Kilic v. Turkey](#)). In *Volodina v. Russia* the ECtHR stated that 'there is a common understanding in the relevant international material that comprehensive legal and other measures are necessary to provide victims of domestic violence with effective protection and safeguards'. It found in particular that the authorities had tolerated 'a climate which was conducive to domestic violence'. In *Opuz v. Turkey* the ECtHR stressed that domestic violence 'is a general problem which concerns all member States'. The importance of this issue as a 'general problem' is also reflected in *Tölle v. Croatia*. Domestic violence against women, in its different forms, is still not sufficiently recognised as 'real violence'. The chilling effect caused by the criminal conviction of the president of an organisation protecting and supporting victims of domestic violence might therefore contribute to further tabooing of domestic violence. Silencing Ms Tölle had as a consequence that the underlying problem of domestic violence in this case, and in many other cases, was not revealed nor discussed. The ECtHR also criticises the approach by the domestic courts limiting their analysis to the fact that D.O. had never been convicted of domestic violence. The position of the ECtHR that 'it is unreasonable' to require proof of a criminal conviction with regard to allegations in the context of a defamation or insult case, is a very relevant one where allegations of domestic violence are concerned. Only in very few cases domestic violence is prosecuted, and it is even more rare that the perpetrator is convicted or sanctioned. Therefore, it is important that the ECtHR also refers to other circumstances and 'reasonable grounds' to believe that D.O. had actually abused his wife. With the judgment in *Tölle v. Croatia* the ECtHR contributes to greater awareness of the real problem – how to report, reveal and discuss cases in order to prevent and stop domestic violence.

*Tölle v. Croatia* **is another step in the ECtHR's deconstruction of a male-oriented approach by domestic authorities in the domain of protection of privacy and reputation and the right to freedom of expression. In [Bodrožić and Vujić v. Serbia](#) the Court** could not accept that comparing a man with a blonde woman was an insult for men. Two journalists had criticized a well-known lawyer in a sharp and satirical style, comparing the lawyer with a blonde woman. The journalists were convicted because it was considered '*insulting to feminise a man*'. The ECtHR was struck by the argument of the domestic courts, as later endorsed by the Serbian government, '*that*

*comparing an adult man to a blonde woman constituted an attack on the integrity and dignity of men*', and that such a comparison was '*objectively insulting within their society*'. The ECtHR found such an argumentation '*derisory and unacceptable*'. The Grand Chamber in [\*Couderc and Hachette Filipacchi Associés v. France\*](#) (see also our [blog](#)) was especially critical of the French domestic courts' failure to weigh up the Prince of Monaco's right to privacy with the right of Ms Coste, the mother of his illegitimate child. The French courts found that an interview in *Paris Match* with Ms Coste about her relation with the Prince, her pregnancy and how the Prince behaved towards the child at his birth and afterwards had breached the Prince's right to privacy. The judgment of the ECtHR honored in particular Ms Coste's right to reveal her story of the relationship, including the story about their child. By emphasizing that Ms Coste "*was certainly not bound to silence*" the ECtHR challenged the male-orientated view in France on keeping silence over having a mistress and a common child. The judgment made clear that the approach by the French courts could not be justified solely on the basis of the right to privacy or the right to reputation of the Prince, but had to be balanced pertinently with the right to freedom of expression and the right of Ms Coste to tell her story. In *Tölle v. Croatia* the ECtHR criticizes the approach by the domestic authorities, not only in terms of a lack of proper balancing between the conflicting rights at issue, but also because of the insufficient attention to the impact of the conviction of Ms Tölle. The ECtHR indeed emphasizes that the criminal conviction of Ms Tölle resulted in a sort of censorship which might have discouraged her from promoting her organisation's statutory aims of protecting and supporting women victims of domestic violence. Hence the criminal conviction of Ms Tölle hindered her in her position as the association's president to help to create awareness about violence against women in her country and to oppose against a climate conducive to domestic violence. The judgment gives support to those who stand up for a better protection of victims of domestic violence and to those who dare to come forward with their stories or counter discourses of victim blaming.

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